

1 EDMUND G. BROWN JR.
2 Attorney General of the State of California
3 DANE R. GILLETTE
4 Chief Assistant Attorney General
5 JULIE L. GARLAND
6 Senior Assistant Attorney General
7 ANYA M. BINSACCA
8 Supervising Deputy Attorney General
9 DENISE A. YATES, State Bar No. 191073
10 Deputy Attorney General
11 455 Golden Gate Avenue, Suite 11000
12 San Francisco, CA 94102-7004
13 Telephone: (415) 703-5531
14 Fax: (415) 703-5843
15 Email: Denise.Yates@doj.ca.gov
16 Attorneys for Respondent Dawn Davison, Warden at
17 the California Institution for Women
18 SF2008400541

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21 IN THE UNITED STATES DISTRICT COURT
22 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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24 OAKLAND DIVISION

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28 **BRANDEE TRIPP,**

29 Petitioner,

30 v.

31 **DAWN DAVISON, Warden,**

32 Respondent.

33 No. 07-05748 CW

34 **RESPONDENT'S NOTICE OF
MOTION AND MOTION TO
DISMISS; SUPPORTING
MEMORANDUM OF POINTS AND
AUTHORITIES**

35 **NO HEARING REQUESTED**

36
37 TO PETITIONER BRANDEE TRIPP, THROUGH COUNSEL ADRIAN
38 WOODWARD,

39 PLEASE TAKE NOTICE that Respondent, Dawn Davison, Warden at the California
40 Institution for Women, moves this Court to dismiss the Petition for Writ of Habeas Corpus,
41 pursuant to 28 U.S.C. § 2254 and Rules 2 and 4 of the Rules Governing § 2254 Cases in the
42 United States District Courts, on the ground that Tripp did not exhaust her state court remedies
43 for all of her claims. This motion is based on the notice and motion, the supporting
44 memorandum of points and authorities and exhibits, the petition for writ of habeas corpus, the

1 court records in this action, and other such matters properly before this Court.

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **INTRODUCTION**

4 Petitioner Tripp (W-15695) is a California prisoner serving an indeterminate life sentence
 5 and is proceeding with counsel in this matter. (Pet. 2, 38, 40.) Tripp alleges that the Governor
 6 violated her federally protected liberty interest in parole when the Governor denied her parole
 7 because the Governor's decision was based on incorrect facts, breached her plea agreement, was
 8 unsupported by the evidence, did not establish a nexus between the facts and her parole risk, and
 9 turned her sentence into life without the possibility of parole. (Pet., Table of Contents & 9.)
 10 Respondent moves to dismiss Tripp's federal petition because she did not exhaust all of her
 11 federal claims in all of the California courts. Rules Governing § 2254 Cases in United States
 12 District Courts, Rule 4, Advisory Committee Notes, 2004 Amendments ("The amended rule
 13 reflects that the response to a habeas petition may be a motion.") Accordingly, this Court must
 14 dismiss this mixed petition.

15 **ARGUMENT**

16 **THIS PETITION MUST BE DISMISSED BECAUSE IT CONTAINS
 17 BOTH EXHAUSTED AND UNEXHAUSTED CLAIMS.**

18 Because Tripp did not exhaust every one of her current federal claims in the state courts,
 19 this Court must dismiss this mixed petition. A federal habeas petitioner must exhaust her
 20 available state court remedies before a federal court may grant her petition. 28 U.S.C. §
 21 2254(b)(1)(A). If one or more claims in the federal petition have not been exhausted, the district
 22 court must dismiss the petition. *Pliler v. Ford*, 542 U.S. 225, 227 (2004) (citing *Rose v. Lundy*,
 23 455 U.S. 509, 510 (1982)). This rule provides the state courts a full and fair opportunity to
 24 resolve federal constitutional claims before they are presented to the federal court, thus
 25 "protect[ing] the state courts' role in the enforcement of federal law." *Rose*, 455 U.S. at 518.

26 It is the petitioner's burden to prove she has exhausted his state court remedies before
 27 filing her federal habeas petition. *Williams v. Craven*, 460 F.2d 1253, 1254 (9th Cir. 1972) (per
 28 curiam). "A petitioner has satisfied the exhaustion requirement if: (1) [s]he has 'fairly

1 presented' [her] federal claim to the highest state court with jurisdiction to consider it [citations].
 2 ... or (2) [s]he demonstrates that no state remedy remains available." *Johnson v. Zenon*, 88 F.3d
 3 828, 829 (9th Cir. 1996). In California, a petitioner exhausts her federal claim by fairly
 4 presenting it to the California Supreme Court. *Kim v. Villalobos*, 799 F.2d 1317, 1318 (9th Cir.
 5 1986).

6 To exhaust state remedies, the petitioner must refer to a specific federal constitutional
 7 guarantee. *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996). At a minimum, the petitioner must
 8 have "explicitly alerted the court that she was making a federal constitutional claim." *Galvan v.*
 9 *Alaska Dept. of Corr.*, 397 F.3d 1198, 1205 (9th Cir. 2005); *accord Shumway v. Payne*, 223 F.3d
 10 982, 998 (9th Cir. 2002) (finding that a claim is not fairly presented to the state court unless the
 11 petitioner specifically indicated to that court that she was asserting a claim under the United
 12 States Constitution). The petitioner may make the federal basis of the claim explicit either by
 13 citing federal law or the decisions of federal courts. *Lyons v. Crawford*, 232 F.3d 666, 668 (9th
 14 Cir. 2000), *amended*, 247 F.3d 904 (9th Cir. 2001). The mere fact that the state supreme court
 15 was aware of the underlying facts that may have given rise to a federal constitutional claim is
 16 insufficient to exhaust a federal claim. *Shumway*, 223 F.3d at 988.

17 Here, Tripp did not exhaust the available state court remedies before seeking federal
 18 habeas relief for all of her federal claims. First, in her California Supreme Court petition, Tripp
 19 appears to raise the same claims as in her federal petition. (*Compare Pet.*, Table of Contents,
 20 *with Ex. 1, Table of Contents.*) Tripp failed, however, to designate her claims in her California
 21 Supreme Court petition as federal claims. That is, nowhere in her California Supreme Court
 22 petition does she use the word "federal" (*see Ex. 1*), nor does she cite to the United States
 23 Constitution (*Ex. 1, Table of Authorities*). Only for her claims regarding her plea agreement, the
 24 lack of a nexus, and continued reliance on her crime does Tripp even cite to federal case law.
 25 (*Pet. 16, 18, 29-30, 32-40.*) Thus, Tripp's claims that the Governor's decision was based on
 26 incorrect facts and was unsupported by the evidence were not fairly presented to the California
 27 Supreme Court as federal claims and are not exhausted. *Hiivala v. Wood*, 195 F.3d 1098, 1106-
 28 07 (finding that petitioner's claim of insufficient evidence was not exhausted because the

1 petitioner did not refer to the Due Process Clause of the United States Constitution and cited
 2 neither the Fourteenth Amendment nor any federal case law involving the legal standard for a
 3 federal Constitutional violation predicated thereon).

4 In addition, because Tripp did not present her nexus claim to the California appellate
 5 court, this claim is unexhausted. If the petition in the state's highest court is one for discretionary
 6 review, the petitioner must have exhausted all of her federal claims at each lower level of the
 7 state courts. *Casey v. Moore*, 386 F.3d 896, 916-18 (9th Cir. 2004). Because Tripp's petition in
 8 the California Supreme Court was a petition for review and thus, one for discretionary review,
 9 Tripp must also have presented all of her federal claims in the appellate court. See Cal. Ct. R.
 10 8.500(b) (delineating when the California Supreme Court may order review of an appellate court
 11 decision). In her California appellate court petition, Tripp did not raise her claim that the
 12 Governor failed to allege a nexus between her crime and her parole risk. (Compare Ex. 1, Table
 13 of Contents, with Ex. 2, Table of Contents.) By not presenting this claim to all of the state
 14 courts, this claim is unexhausted. *Casey*, 386 F.3d at 916-18.

15 Finally, Tripp is not precluded from exhausting her state court remedies because the
 16 California Supreme Court has original jurisdiction to review petitions for writs of habeas corpus.
 17 Cal. Const. art. VI, § 10. Thus, Tripp can still file a habeas petition in the California Supreme
 18 Court alleging the unexhausted claim. Accordingly, Tripp has not "reach[ed] the point where he
 19 has no state remedies available to [her]," *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir.
 20 2003), and the petition must be dismissed. 28 U.S.C. § 2254(c) (providing that a petitioner has
 21 not exhausted the available state court remedies "if [s]he has the right under the law of the State
 22 to raise, by any available procedure, the question presented").

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CONCLUSION

Tripp did not present all of her claims to all of the state courts. Therefore, this Petition must be dismissed because it contains exhausted and unexhausted claims.

Dated: March 12, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

JULIE L. GARLAND
Senior Assistant Attorney General

ANYA M. BINSACCA
Supervising Deputy Attorney General

DENISE A. YATES
Deputy Attorney General

Attorneys for Respondent Dawn Davison, Warden at the California Institution for Women

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re BRANDEE TRIPP**

No.: **07-05748 CW**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **March 13, 2008**, I served the attached

**RESPONDENT'S NOTICE OF MOTION AND MOTION TO DISMISS; SUPPORTING
MEMORANDUM OF POINTS AND AUTHORITIES**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

**Adrian T. Woodward, Esq.
Law Offices of Adrian T. Woodward
States Bar No. 184011
4266 Atlantic Avenue
Long Beach, CA 90807
attorney for Brandee Tripp**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **March 13, 2008**, at San Francisco, California.

J. Palomino

Declarant

40228683.wpd


Signature